IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1505

A. W. THOMPSON, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

INDEX (Continued)

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

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The Petitioner, A. W. Thompson, Inc. (hereinafter "Petitioner" or "Thompson"), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 30, 1976, Petition for Rehearing denied on February 26, 1976, notification of which was received March 1, 1976.

OPINION BELOW

The slip opinion of the Court of Appeals (App. A, infra, pp. 1a-7a) is reported at ___ F.2d ___. The Board's Decision and Order is reported at ___ NLRB # ___,

(App. B, infra, pp. 9a-38a). The opinion enforced the Board's order requiring Petitioner to bargain with Local 826, International Union of Operating Engineers, AFL-CIO.

JURISDICTION

The decree of the Court of Appeals (App. A, infra, pp. 7a-8a), was entered on January 30, 1976 and the Order denying rehearing en banc was entered on February 26, 1976. Motion for withdrawal of Mandate and Stay of Mandate was granted on March 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This case arose when Thompson withdrew union recognition more than nineteen months after the certification year began and at expiration of contract, and more than seven years after the election. The withdrawal was because Thompson had a good faith doubt of the union's continuing majority status grounded on (1) company was experiencing a 400% turnover annually; (2) company was operating eleven rigs scattered over a wide geographical area; (3) no union organizing activity went on during the period; (4) no union representative visited rigs or the shop; (5) the last list of names and addresses in the hands of the union was 18 months olds; (6) only 20 to 25 eligible voters in 1966 election were still employed by the company; (7) the work force required had doubled since the election from 105 to about 200; (8) union did not appoint any stewards, did not file or process any grievances, did not utilize any of the bulletin boards, did not communicate with the company; and (9) some employees expressed dissatisfaction with the union.

The questions presented are:

1. Whether it is necessary for Employer to prove actual loss of majority status before it can lawfully withdraw recognition of a union as bargaining agent for its employees?

2. Could the accumulated circumstances set out above warrant a good faith doubt of the union's majority status?

3. Whether the N.L.R.B. and the reviewing court are required to consider the totality of all the circumstances in determining Petitioner's asserted good faith doubt?

4. Whether the N.L.R.B. is permitted to substitute its opinion for Petitioner's good faith doubt?; and may the reviewing court uncritically accept such opinion?

STATUTE

". . . the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . .". 28 U.S.C. 160(e), Public Law 61 Stat. 136 §10(e).

STATEMENT OF THE CASE

1.

Proceedings Before The National Labor Relations Board

The Board found Petitioner had violated Section 8(a)(5) of the Act and thus was automatically in violation of Section 8(a)(1), as a result of Petitioner's withdrawing recognition of the union as bargaining representative at the expiration of the contract with the union, December 31, 1973, some 19 months prior to termination date. At termination of the contract, Petitioner notified the union that it would no longer recognize it because Petitioner had a good faith doubt of the union's majority status and suggested that if the union believed it had a majority that it demonstrate the same. At no time did the union attempt to demonstrate its majority by any of the several ways authorized and suggested by the Board.

Petitioner is an oil and gas drilling contractor operating in the Permian Basin of West Texas and eastern New Mexico. It was operating 11 rigs in that vast area and had a shop and yard in Odessa, Texas.

At the time of the NLRB election in 1966, the union won by a vote of 62 to 40. At that time the company had 105 jobs for employees and by the last 1 or 3 years prior to December 31, 1973 had expanded to more than 200 jobs. There were only 20 to 25 unit employees still on the payroll that voted in the union's election in 1966. The company sent out 872 W'2s for unit employees for the calendar year 1973 and that constituted a turnover

of more than 4 to 1 and nearly 5 to 1 as to the employees other than the 20 to 25 regular ones. That means 4 or 5 employees for each available job.

The union's business agent testified essentially as follows: Neither he nor any of his subordinates ever went to any of the rigs to post notices or collect dues because it would have incurred a terrific expense and quite an amount of time to get in the automobile and drive to the rig and post notices. It did not attempt to use union members, who worked on the rigs, to find out the names and addresses of new employees who were not union members because that system has never worked out. Petitioner's employees were notified of the meetings by notices mailed out using old addresses in the union's files. The union never processed any grievances nor appointed any stewards. The union's area of responsibility was the entire southern half of New Mexico, east to Abilene, Texas, north to Wichita Falls, Texas, to 10 miles north of Lubbock, Texas, and all the way to El Paso, Texas. The union only had a business manager, an assistant business manager, an office secretary in Big Spring, Texas, a parttime business agent in Big Spring, Texas, a secretary in Odessa, Texas, and a secretary in Hobbs, New Mexico.

The last list of Petitioner's employees, in possession of the union, was one furnished to the union in June of 1972. Thus, because of the drastic turnover, only 20 to 25 names on that list would have been working for Petitioner during the contract period. According to Frank Thompson, president of A. W. Thompson, Inc., Petitioner, and his administrative assistant, some employees came by to ask how they could get loose

from the union, or "what do you hear about the union?", or "I thought we were rid of the union", and other unfavorable comments about the union during the period of the contract.

Mr. Frank Thompson made the decision to withdraw recognition because of his good faith doubt grounded upon all of the foregoing circumstances and the inferences that would naturally be drawn from them.

The Administrative Law Judge, in his decision, admitted that a 4 to 1 turnover in employees in one year

> "might well create in one's mind a question as to whether a union had retained its majority".

However, the Judge then went off on a tangent about "turnover alone" having been ruled by the Board as insufficient legal ground upon which to base a good faith doubt of union majority. He then cited *Laystrom Manufacturing Co.*, 151 NLRB 1482; but that decision was specifically overturned by the Seventh Circuit which denied enforcement in 359 F.2d 799 (CA-7, 1966).

The Adm. Judge then proceeded to discuss each of the circumstances separately, placing his own interpretation or meaning on such circumstances, and all without regard to their overall relationship and their collective effect. Since he had concluded, in his own mind, each circumstance standing alone could not justify a good faith doubt, he concluded Mr. Thompson could not have a good faith doubt. A three member panel of the Board adopted the Adm. Judge's decision without comment.

The Board petitioned the Fifth Circuit Court of Appeals for enforcement of its order.

2.

The Decision Of The Court Of Appeals

The Court of Appeals has upheld the Board's finding that Petitioner violated Sections 8(a)(1) and (5) of the Act by withdrawing recognition from the union and refusing to bargain with it. In doing so, it said the company

> "failed to prove a majority of the employees no longer desired union representation"

and that the relevant inquiry was

> "whether or not the union continued to maintain majority status",

while the position of the company was that all it had to prove was it had a "good faith doubt". The Court then proceeded to adopt the Adm. Law Judge's seriatum elimination of the various grounds of Petitioner's good faith doubt and adopted the Adm. Law Judge's inferences, reasoning and conclusions.

REASONS FOR GRANTING THE WRIT

I.

The Issues Presented In This Case Are Of Great National Importance Affecting Millions Of People

The effect of the deceptively simple and completely erroneous decision below is to make every employer-union bargaining relationship a permanent one, unless an employer can prove actual loss of majority. It is common knowledge it is almost impossible for an employer to prove a loss of majority status of the union without committing an unfair labor practice. Thus, the decision below makes it impossible for an employer to withdraw recognition of a certified union, after the certification year has expired, except by proof of actual loss of majority. This construction finds no support in the language of the Act; is contrary to the legislative history attending the statute; and is inconsistent with the essential holding of this Court in *Franks Bros. vs. NLRB*, (1943) 321 U.S. 702, 64 S.Ct. 817, wherein the Court stated:

> "For the Board order which requires an employer to bargain with a designated unit is not intended to fix a permanent bargaining relationship without regard to new situations that may develop."

It is also inconsistent with the essential holding of this Court in *Brooks vs. NLRB*, 348 U.S. 96, 75 S.Ct. 176 (1954). In that case this Court cited with approval *Celanese Corp. of America*, 95 NLRB 664 (1951), and that Board decision set forth the ground rules whereby an employer may withdraw recognition of the union after the certification year if it has a good faith doubt of the union's majority status.

The effect of the decision below is to deny, under circumstances similar to this case, employees their right

to utilize or not utilize a union bargaining representative, and force the employer to bargain with a union in good faith, which will probably result in an inane and meaningless working agreement; but one which will have the effect of hamstringing the company in its relations with its employees during the period of the contract.

If the decision below is allowed to stand, the Board will be able to flout the purposes of the Act requiring Board decisions to be supported by substantial evidence on the record as a whole, thus affecting the rights of millions of workers and thousands of employers. The Board will be permitted to consider only the evidence it wants to consider and to make all kinds of inferences and surmises without substantiation in the record.

Unions will be permitted to maintain representation status over employees for indefinite periods without knowing who the employees are; without any attempt to represent the employees on a daily or otherwise consistent basis; without any organizational attempts even though there is a rapid and constant changeover in employees; and no matter how inept the union may be in its ability or desire to actually represent the workers or even know them; or without the employees knowing the union.

The purpose of the Labor Management Relations Act of 1947 is to prescribe the legitimate rights of both employees and employers in their employee-employer relationship and not the union bosses. (29 U.S.C., §141(b))

II.

The Decision Below Grossly Misstated The Holdings In Several Cases Upon Which The Decision Is Grounded

A. Under headnote 1, page 3a, (App. A), the Court below, after stating at the expiration of one year the presumption (of union majority) continues subject to rebuttal on proof by the company that it entertained a good faith doubt of the union's majority status, quoted from *N.L.R.B. vs. Gulfmont Hotel Co.*, 5 Cir. 1966, 366 F.2d 588, 589, said:

> "Such a doubt, however, must rest on a reasonable basis and may not depend solely upon unfounded speculation or a subjective state of mind."

It then said:

> "Applying those principles to the present proceedings, we have no difficulty in understanding the Board's conclusion that the company failed to support its burden of proof."

However, the decision failed to quote a much more important statement in *Gulfmont, supra*, and this failure distorted and misstated the *Gulfmont* holding. The unquoted *Gulfmont* statement says:

> "It is rather the question of fact whether the company had a *reasonable basis* at the time of

> its refusal to bargain *for believing* that majority support of the bargaining unit no longer existed." (emphasis added)

All that was necessary, even according to *Gulfmont, supra*, was for Thompson to prove a reasonable basis for believing that the majority support of the bargaining unit no longer existed. The Court below did not follow this rule of law.

In *Gulfmont, supra*, the employer attempted to show doubt of union majority status solely by changes in dues checkoff authorizations but the record showed the dues checkoff authorizations remained relatively stable with a high of 77 and a low of 69. The only grounds for the doubt was the additions and deletions from the dues checkoff list. Thus, it is clear *Gulfmont, supra*, is not analogous to the present situation. There were certainly more than "unfounded speculations or a subjective state of mind" in the instant case.

B. Under headnote 2, page 3a (App. A), the decision completely misstated the law when it said:

> "We need not elaborate at length on the reasons given by the company to support its alleged good faith doubt, for it offered no objective proof that any of the employees, much less a majority of them, no longer desired union representation."

There are no cases cited by the Board in its brief before the Court below or cited by the Court below, and so far as can be determined, there are no cases on

record which hold an employer, before it can have a good faith doubt must prove that any or a majority of its employees no longer desired union representation, or whether or not the union continued to maintain a majority status. The decision below merely adopted language in the Board's brief at page 9 thereof.

Contrariwise, the law is clear and the Board itself has recognized the almost impossibility of an employer proving loss of majority status without violating the law. In *Stoner Rubber Co., Inc.*, 123 NLRB 1440 at page 1445. the Board said:

> "After the lapse of the certification year, the certification creates only a presumption of continued majority. The presumption is rebuttable. Proof of majority is peculiarly within the special competence of the union. It may be proved by signed authorization cards, dues checkoff cards, membership lists, or any other evidentiary means. An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority, the employer need only to produce sufficient evidence to cast serious doubt on the union's majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal to bargain date the union, in fact, did represent a majority of employees in the appropriate unit."

Furthermore, the record does show that a number of employees no longer desired union representation.

The decision below then stated:

> "The reasons asserted by the company are based either upon assumptions of fact not supported by the evidence, or have little or no connection with the relevant inquiry, i.e., *whether or not the union continued to maintain majority status.*" (emphasis added)

The first part of that quote

> "The reasons asserted by the company are based either upon assumptions of fact not supported by the evidence . . . ."

is clearly and completely erroneous. All the reasons asserted by the company were based on uncontradicted evidence in the record.

The second part of the quote

> ". . . or have little or no connection with the *relevant inquiry*, i.e., *whether or not the union continued to maintain majority status.*" (emphasis added)

is also clearly and completely erroneous. It is not only contrary to its own holding in *Gulfmont, supra*, but more important, it is contrary to this Court's holding in *Brooks vs. NLRB, supra*, that all that is required is an employer have "fair doubts about the union's continuing majority".

C. Misstatement of prior holdings.

The Court below said the necessity of further discussions of Thompson's principal basis for its doubt, rapid turnover of employees, was obviated by this Court's recent decisions in consolidated cases of *NLRB vs. Leatherwood Drilling Company* and *NLRB vs. Brahaney Drilling Company*, 5 Cir., 1975, 513 F.2d 270, Cert. den'd. No. 75-419, ____ U.S. ____, 96 S.Ct. 449, 46 L.Ed.2d ____ (1975), in which similar arguments under circumstances factually indistinguishable were made and rejected. The Court said:

> "In enforcing the Board's order we said, with regard to the emphasis placed by *Leatherwood* and *Brahaney* on the magnitude of the employee turnover, 'in our view, this only reargues what has been decided in *Hondo*, i.e., that turnover is inherent in this industry and cannot be given independent significance as a sign of union weakness.' 513 F.2d at 273".

The Court in the *Leatherwood* and *Brahaney* cases, *supra*, said:

> "They (respondents) emphasized the magnitude of 900% employee turnover. But in our view, this only reargues what has been decided in *Hondo*, i.e., that turnover is inherent in this industry and cannot be given independent significance as a sign of union weakness. *NLRB vs. Hondo Drilling Co.*, 428 F.2d at 944-946."

There is no such holding in *NLRB vs. Hondo Drilling Co.*, 428 F.2d 943, 944-946. That case did not even discuss "turnover" as such, nor did it hold that turnover is inherent in this industry. It made no reference whatsoever to turnover being related to union weakness or strength. The statement was fabricated out of the whole cloth to support the Court's apparent preconceived and predetermined decision to uphold the Board.

The original *Hondo* case, *supra*, was solely a determination of an eligibility formula for voting and there is nothing in that case to support or justify the Court's statement in the *Leatherwood* and *Brahaney* case, *supra*, or in the instant case, that Hondo decided

> ". . . that turnover is inherent in this industry and cannot be given independent significance as a sign of union weakness."

Since the Court below erroneously foreclosed its consideration of a vital element of Thompson's good faith doubt, it is incumbent upon this Court to grant a writ. Otherwise precedent will be set compounding error upon error.

This is extremely important because the Adm. Law Judge admitted that a

> "turnover of 800 employees for a 200 job operation might well create in one's mind a question as to whether a union had retained its majority."

That statement alone is sufficient to require a writ.

If large turnover would be considered as an element of good faith doubt in an industry that has little or no turnover, it is ridiculous not to so consider it in an industry that has inherently large turnover. It is the fact of large turnover that affects the judgment of a person.

III.

The Decision Below Is Clearly And Seriously A Misapprehension And A Gross Misapplication Of The Proper Standards Of Review Of The NLRB Decision And Order As Annunciated By This Court In *Universal Camera Corp. vs. NLRB.*

This case raises substantial and important questions concerning the standards of review followed by the Court below in its enforcement of the NLRB order. It has misapprehended and grossly misapplied the standards of review as taught by this Court in *Universal Camera Corp. vs. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), and is in conflict with that case.

A. The sole issue before the Board was whether Thompson established reasonable grounds as a basis for its good faith doubt of the union's majority status. The Board has set out the guidelines for determining such good faith doubt in *Celanese Corp. of America, supra*, cited with approval by this Court in *Brooks vs. NLRB, supra*. That guideline says the issue must be decided in light of the "totality of all the circumstances". It was incumbent upon the Board to consider all the factual elements and then decide if all those factual elements, taken as a whole, could cause a reasonable person in Mr. Thompson's position to have good faith doubts of the union's continuing majority status. This the Board did not do. Instead, the Board, with the approval of the Court, not only failed to take into consideration all the grounds for doubt, but actually isolated each ground it did consider and found each isolated ground, standing alone, insufficient to be a reasonable basis for a good faith doubt. That is contrary to the teaching of *Universal Camera Corp., supra*.

It was the function of the reviewing court to examine the record and decide if the Board (1) followed its own guidelines set out in *Celanese Corp. of America, supra*, and (2) whether the decision of the Board was supported by substantial evidence on the record. The Court failed as to both.

It is clear, even from a casual reading of the opinion, the Court did not require the Board to follow its own guidelines and further neither the Board nor the Court considered the record as a whole in determining whether the totality of the circumstances could cause a reasonable person to have good faith doubts.

Under the teachings of *Universal Camera, supra*, courts must assume responsibility for the reasonableness and fairness of Board decisions. In determining the substantiality of evidence the Court must take into account whatever in the record fairly detracts from its weight. The Court did not even consider possible inferences opposite those drawn by the

Board, and yet, the test is the belief of Thompson, not the Board.

B. The Court uncritically accepted and followed the false trail laid out by the Board in misapplying the evidence and its meaning with respect to the controlling question and legal principle.

The question was: Did Thompson have reasonable grounds for doubting the union's continuing majority status more than 19 months after the certification year began?

The presumption of union majority status is surely based on the reasonable assumption that the union:

1. At least knew on a current and continuing basis who the employees were;

2. At least contacted the employees on some regular basis;

3. Was aware of who the new hires were;

4. Contacted the new hires to seek authorization for representation or union membership; and

5. Maintained close surveillance of employees' working conditions.

In determining the reasonable grounds, the Board must consider all the reasonable inferences that Thompson could have drawn from the factual elements and then determined if there was any evidence that would produce contrary inferences.

Some of the factual elements and their logical inferences under the circumstances of this case are:

1. Four or five to one turnover in unit employees in one year with rigs scattered over hundreds of thousands of square miles — logical inference — union didn't know who worked for the company and thus could not maintain its representative status. That inference was recognized by the Adm. Law Judge, supra, page 15.

2. Union did not process any grievances — logical inference — Union had no adherents because it is illogical to assume, with hundreds of employees working 3 shifts per day, long distances from top supervision, would have no complaints that the union would not want to process or exploit.

3. Union did not appoint stewards — logical inference — union could not find adherents to appoint and thus had no one at the rigs attempting to organize new hires.

4. Union did not use bulletin boards — logical inference — union had no adherents to use for posting and would be illogical to assume the union would not use the bulletin boards to notify employees of union meetings since the union management did not go to the rigs and had no stewards and the last list of employees' names and addresses was nearly a year old at the time the contract was signed.

5. Lack of communication between the union and the company — logical inference — lack of communication between company's employees and the union because it is illogical to assume that with more than 200 employees working daily, there would not have been some reasons for employees to communicate with the union and the union to communicate with the company.

6. Unfavorable employee comments — logical inference — since the unfavorable employee comments were made to Mr. Thompson in casual conversations when he happened to see them in the yard, it could logically be assumed that there must have been many more out on the rigs that Mr. Thompson never did see.

Neither the Board nor the Court considered the fact that the union at no time attempted to prove its majority status, even though requested to do so when the employer withdrew recognition. Neither did the General Counsel attempt to prove the union's majority status. Neither the Board nor the Court considered the obvious belief of the General Counsel that the union did not represent a majority of the employees when he stated on the record:

> "I would like to say that this evidence will show that this union very reluctantly agreed to a substandard contract because it couldn't strike to enforce its demands."

C. The holding in this case is contrary to fairly recent cases decided by the Board. Those cases are *Taft Broadcasting, WDAF-TV, et al*, 201 NLRB 113 (2-13-73); *Southern Wipers, Inc.*, 192 NLRB 1355 (8-19-71); and *Viking Lithographers, Inc.*, 184 NLRB 16 (7-30-70). In the *Taft* case, *supra*, the Board found:

1. Almost 100% turnover of employees since the last contract;

2. Relative inactivity by the union in recent years; and

3. Expressions of employee dissatisfaction with the union made to company officials.

The Board pointed out that though each factor relied upon by the employer may have weaknesses standing alone, the employer relied upon all of those factors as a whole and concluded the employer provided sufficient evidence, when considered in its entirety, to cast a serious doubt on the union's majority status.

The other two cases are of similar import and had similar facts.

D. Where the employer presents evidence, considered in its entirety, which casts serious doubt on the union's continuing majority, the burden shifts to the General Counsel to come forward with evidence that the union did, in fact, represent a majority of the employees of the unit. That statement was referred to by the Board in *Taft Broadcasting, supra*. It follows a long line of cases, one of the earliest of which is *Stoner*

Rubber Co., Inc., supra. To the same effect see *NLRB vs. J. S. Swift Company, Inc.*, 302 F.2d 342 (CA-7, 1962) and *NLRB vs. Little Rock Downtowner, Inc.*, 414 F.2d 1084 (CA-8, 1969)

IV.

The Decision Below Is In Direct Conflict With Decisions In The Sixth, Seventh And Eighth Circuit Courts Of Appeals As Well As With Its Own Decisions.

The Decision below is not only in serious conflict with the decision of this Court in *Universal Camera Corp., supra*, as described above, but also is in conflict with decisions of other Circuit Courts of Appeal.

Seventh Circuit Court of Appeals. *Ingress-Plastene, Inc. vs. NLRB*, 430 F.2d 542 (1970). In that case, as in the instant case, the Board attacked individually the several grounds of the employers, including the factor of significant turnover. The Court of Appeals said the company did not rely on any one reason alone, but rather on all as a whole. It then found the employer had a good faith doubt. This is in conflict with the instant case where the Court below approved the Board's attacking the employer's grounds individually and did not consider them as a whole.

NLRB vs. Laystrom Mfg. Co., 359 F.2d 799 (CA-7, 1966). The Seventh Circuit refused to enforce the Board's bargaining order. The Board's decision (*Laystrom Mfg. Co.*, 151 NLRB #144), cited by the Board in the instant cases, said:

> "Turnover standing alone does not provide a reasonable basis for believing the union had lost its majority status."

The factors were the close vote of 17 to 13 two years before withdrawal of recognition, 16 eligible voters out of 35 left since the election and 8 new employees hired, and the union-shop provision. The Seventh Circuit Court held those factors (as determined by the Hearing Officer) were sufficient to form the basis of a good faith doubt on the part of the employer. The Court also pointed out the union, when challenged, made no effort to disclose its majority status.

Sixth Circuit Court of Appeals. *Phillip Carey Mfg. Co., Miami Cabinet Div. vs. NLRB*, 331 F.2d 720, 734 (CA-6, 1964) (cert. den., 379 U.S. 888). That Circuit Court said there would be substantial ground for doubt concerning the union's majority status after pointing out the closeness of the vote (122 for the union and 112 against), and the large number of strikers who were replaced. It refused to enforce the bargaining order.

Eighth Circuit Court of Appeals. *National Cash Register Co. vs. NLRB*, 466 F.2d 945 (CA-8, 1974). The law judge considered the elements seriatum (as in the instant case) and concluded that none of them individually would constitute a sufficient basis for a good faith doubt. However, the Court said,

> "Considered together we believe that good faith doubt has been demonstrated at least to the point of requiring the General Counsel to come forward with evidence that the union did

represent a majority of the employees in the unit on the refusal to bargain date. This the General Counsel did not do."

That Court refused enforcement of the Board's order to bargain.

The approach of the Court of Appeals for the Fifth Circuit to judicial review of the Board's considering seriatum the factual elements forming the basis of an employer's good faith doubt differs from the approach required by *Universal Camera Corp. vs. NLRB, supra*, and from the approach taken by other Courts of Appeal. This difference, it is submitted, results in the court's holding (1) that the Board did not abuse its discretion is not considering all the elements as a whole in which other courts find an abuse of discretion, and (2) allowing the Board to engage in all kinds of inferences and surmises not supported by the evidence. Such an approach is totally inapplicable to proper judicial review of the Board's decision.

The Administrative Law Judge's inferences and surmises as to the meaning of the various elements forming Thompson's good faith doubt were nothing more than inferences and surmises and do not comport to common knowledge, practices and functions of the unions or common sense. When the Court below accepted those inferences and surmises as fact, it was in conflict with its own decisions in *Poultry Enterprises, Inc. vs. NLRB*, 216 F.2d 798 (CA-5, 1954) and *NLRB vs. Coats & Clark, Inc.*, 231 F.2d 567 (1956).

CONCLUSION

Petitioner respectfully submits that if the Decision below is allowed to stand it will allow the Board to substitute its bias in the place of the rule of law and reason and permit the reviewing court to derogate its reviewing responsibilities. Therefore, for all the reasons stated herein, this Petition for Writ of Certiorari should be granted and the decision below promptly reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies each of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the herein styled case were mailed to each of the following on the ____ day of April, A.D., 1976:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and

Honorable Elliott Moore
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APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

A. W. THOMPSON, INC., Respondent.

No. 75-2912.

United States Court of Appeals,
Fifth Circuit.

Jan. 8, 1976.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case).

Before GOLDBERG and AINSWORTH, Circuit Judges, and NICHOLS,* Associate Judge.

AINSWORTH, Circuit Judge:

This case is before us on petition of the National Labor Relations Board for enforcement of its order of February 25, 1975 against A. W. Thompson, Inc. [Company], one of approximately 60 oil well drilling contractors operating in the Permian Basin, an area covering about 160,000 square miles in West Texas and New Mexico. The company operates eleven rigs which are spread out over this vast area. Rig No. 1, for example, is 165 miles from Rig No. 11. Frequent relocation of operations and high employee turnover are distinguishing features of the industry.[1]

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* Of the U.S. Court of Claims, sitting by designation.

1 *See, e.g., N.L.R.B. v. Hondo Drilling Co., N.S.L.*, 5 Cir., 1976, ___ F.2d ___; *N.L.R.B. v. Leatherwood Drilling Company*, 5 Cir., 1975, 513 F.2d 270, *cert. denied*, ___ U.S. ___, 96 S.Ct. ___, 46 L.Ed.2d ___ (1975); *N.L.R.B. v. Hondo Drilling Co.*, 5 Cir., 1970, 428 F.2d 943.

On December 28, 1973, the Company withdrew recognition from Local 826, International Union of Operating Engineers, AFL-CIO [the Union] which had been certified by the Board as the exclusive bargaining representative of the appropriate unit of Company employees. Three days later, on December 31, 1973, the then current contract between the parties expired. Thereafter, on January 6 and April 14, 1974, without notification or consultation with the Union, the Company unilaterally granted wage increases to its employees. The Board found the Company to be in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act by engaging in the following unfair labor practices: refusing to bargain; withdrawing recognition from the Union; refusing to furnish the Union with data, relating to names and addresses of employees; and unilaterally granting wage increases to its employees.

The Board seeks to enforce its order requiring the Company to cease and desist from those unfair labor practices. The Company resists enforcement of the Board's order, contending that because of its good-faith doubt of the Union's continuing majority status, it was entitled to withdraw recognition, to withhold the personnel lists and to grant the wage increases. The Board found that the Company failed to meet its burden of proving a good-faith doubt. The question before us is whether the record as a whole supports that finding,[2] inasmuch as the Company justifies its actions, found to be violative of the Act, by the existence of its good-faith doubt of the Union's continuing representation.

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2 *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

[1] In the absence of special circumstances a union's majority status is irrebuttably presumed for one year following certification by the Board. At the expiration of that year the presumption continues subject to rebuttal on proof by the company that it entertains a good-faith doubt of the union's continued majority status. *See N.L.R.B. v. Hondo Drilling Co., N.S.L., supra*, decided today, and cases cited therein. Such a doubt, however, must rest on a reasonable basis and may not depend solely upon unfounded speculation or a subjective state of mind. *See N.L.R.B. v. Gulfmont Hotel Company*, 5 Cir., 1966, 362 F.2d 588, 589; *General Electric Co., Battery Prod., Cap. Dept. v. N.L.R.B.*, 5 Cir., 1966, 400 F.2d 713, 727. Applying those principles to the present proceedings, we have no difficulty in understanding the Board's conclusion that the Company failed to support its burden of proof.

FACTORS RELIED ON BY THE COMPANY AS A BASIS FOR ITS GOOD-FAITH DOUBT

[2] We need not elaborate at length on the reasons given by the Company to support its alleged good-faith doubt, for it offered no objective proof that any of the employees, much less a majority of them, no longer desired union representation. The reasons asserted by the Company are based either on assumptions of fact not supported by the evidence, or have little or no connection with the relevant inquiry, i.e., whether or not the Union continued to maintain majority status.

a. *Magnitude of employee turnover*

The Company asserts, as the principal basis for its doubt, the rapid turnover of employees. Recent

decisions by this Court concerning drilling operations in the Permian Basin under circumstances virtually indistinguishable from those in the present case obviate the necessity of further discussion of this issue. *See N.L.R.B. v. Leatherwood Drilling Company*, 5 Cir., 1975, 513 F.2d 270 at 273, *cert. denied*, ___ U.S. ___, 96 S.Ct. ___, 46 L.Ed.2d ___ (1975), in which we held that employee "turnover is inherent in this [drilling] industry and cannot be given independent significance as a sign of Union weakness," and *N.L.R.B. v. Hondo Drilling Co., N.S.L.*, 5 Cir., 1976, ___ F.2d ___ at ___, consolidated herewith for argument and decided today, in which the *Leatherwood* holding is reiterated.[3]

In addition to rapid employee turnover, the Company contends that the following factors influenced its good-faith doubt of continued Union majority status: failure of the Union to appoint rig stewards, to process grievances and to use bulletin boards, lack of communication between Union and Company, and alleged comments from employees manifesting dissatisfaction with the Union.

b. Absence of rig stewards and processing of grievances

3 The employee turnover is approximately 400 per cent and only 20 to 25 of the original 103 employees voting in the election were still employed when Union recognition was withdrawn. Leatherwood Drilling Company had an employee turnover of 900 per cent; Hondo Drilling Company, 1700 per cent. The three drilling companies, A. W. Thompson, Inc., Leatherwood and Hondo, are all represented in negotiations with the Union by Brooks L. Harman, attorney. The exclusive representative of the employees in the appropriate bargaining units of the three companies is Local 826, International Union of Operating Engineers, AFL-CIO.

The Company contends that despite provisions in the Working Agreement between the parties for the processing of grievances and the appointment by the Union of rig stewards, the Union has failed to take advantage of either benefit, thus creating a Company doubt of continued Union representation. While it is undisputed that the Union neither appointed stewards for any of the rigs nor processed grievances with the Company, the evidence shows and the Board found that the Company was unable to prove that the Union's failure in either respect reflected adversely on its responsibilities as bargaining representative. No grievances were ever processed because no grievances were ever filed by the employees and there is nothing in the record to indicate employee discontent sufficient to justify the filing of grievances. Since one of the primary duties of a rig steward is to resolve disputes among the employees and to process grievances in their behalf, we find it without significance that no rig steward was appointed.

c. Alleged failure of the Union to use bulletin boards

There is no merit to this contention. First, the record does not support it; bulletin boards were in fact used occasionally. Secondly, there was no requirement that the Union make use of the bulletin boards. The record shows that direct mailings were preferred by the Union as a means of employee communication because of the privacy of the communication, and the time and expense involved by Union representatives being required to travel from one rig to another in order to make use of the bulletin boards. Thirdly, and most importantly, there is no apparent connection between the

use of bulletin boards and the creation of a good-faith doubt by the Company of the Union's continued majority status.

d. Lack of communication between Union and Company

Here again the evidence does not support the contention that there was no communication from the Union to the Company between May 29 and October 22, 1973. Moreover, even if the statement were correct it would be rejected as evidence supporting a reasonable belief that the Union had lost its majority. This is because of the unique situation existing in the Permian Basin — the Union's low manpower and the geographic dispersal of the drilling companies operating in the area which may reasonably account for long periods of silence. *See N.L.R.B. v. Leatherwood Drilling Company, supra*, 513 F.2d at 273.

e. Alleged unfavorable employee comments

Evidence in favor of the Company's assertion relative to unfavorable employee comments came from the testimony of the Company's President and his administrative assistant. The Board found this testimony vague, partaking of hearsay and unconvincing. A review of the pertinent parts of the transcript leads us to the same conclusion. The alleged dissidents were estimated at between 4 to 6 out of a unit of approximately 200 employees, no names were given and the alleged dissatisfaction was based in part on the witness' interpretation of conversations with employees.

We conclude that the Board's findings are supported by the record and that the Company failed to prove that it had a good-faith doubt of the Union's continuing majority status necessary to justify its actions allegedly based on that doubt.

Enforced.

United States Court of Appeals
For the Fifth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus No. 75-2912

A. W. THOMPSON, INC.,
Respondent.

JUDGMENT

Before: GOLDBERG and AINSWORTH, Circuit Judges, and NICHOLS,* Associate Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, A. W. Thompson, Inc., Odessa and Midland, Texas, its officers, agents, successors, and assigns, on February 25, 1975. The Court heard argument of

* Of the U.S. Court of Claims, sitting by designation.

respective counsel on November 3, 1975, and has considered the briefs and transcript of record filed in this cause. On January 8, 1976, the Court being fully advised in the premises handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, A. W. Thompson, Inc., Odessa and Midland, Texas, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: Jan. 30, 1976

United States Court of Appeals
For the Fifth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus No. 75-2912

A. W. THOMPSON, INC.,
Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above-captioned

case has this day been served by air mail upon the following counsel at the address listed below:

Brooks L. Harman, Esquire
112 West 5th Street
Odessa, Texas 79761

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D.C.
this 22nd day of January, 1976.

APPENDIX B

[277]

[Dated 2/25/75] [D-9613
Odessa and Midland, Texas]

* * * * *

DECISION AND ORDER

On November 7, 1974, Administrative Law Judge Wellington A. Gillis issued the attached Decision in

this proceeding, as corrected by an erratum issued December 9, 1974. Thereafter, the Respondent filed exceptions, the General Counsel filed a brief in support of the Administrative Law Judge's Decision and an answering brief, and the Respondent filed a brief in reply.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

[278]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, A. W. Thompson, Inc., Odessa and Midland, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for the Administrative Law Judge's notice.

1 The motions made by the General Counsel and the Respondent respectively to strike portions of the Respondent's exceptions and to strike the General Counsel's answering brief and motion to strike are denied.

Dated, Washington, D.C., February 25, 1975.

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

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[230]

[Dated 11/7/73] [JD-708-74
Odessa, Tex.]

* * * * *

DECISION

Statement of the Case

WELLINGTON A. GILLIS, Administrative Law Judge: This case was initially tried before me on March 14, 1974, at Odessa, Texas, and is based upon a charge and an amended charge filed on January 4 and 9, 1974, respectively, by Local 826, International Union

of Operating Engineers, AFL-CIO, hereinafter referred to as the Union, upon a complaint issued on January 30, 1974, by the General Counsel for the National Labor Relations Board, hereinafter referred to as the Respondent or the Company, alleging violations of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended (61 Stat. 136), and upon an answer timely filed by the Respondent denying the commission of any unfair labor practices.

At the hearing all parties were represented by counsel, and were afforded full opportunity to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to engage in oral argument. Subsequent to the close of the hearing, on April 17, 1974, timely briefs were submitted by counsel for the General Counsel and for the Respondent.

[231]

Thereafter, prior to the rendering of a decision in the matter, based upon separate charges filed on April 22 and May 13, 1974, by the Union, the General Counsel, on May 13, 1974, issued a second complaint against the Respondent in Case No. 16-CA-5537, alleging additional violations of Section 8(a)(1) and (5) of the Act. Simultaneous with the issuance of complaint, the General Counsel filed with the Administrative Law Judge a Motion to Reopen Record and Motion to Consolidate Cases. After having thereafter filed a timely

Motion in Opposition to the General Counsel's motion and an Amended Answer, the Respondent by telegram dated June 6, 1974, withdrew its opposition to reopen and to consolidate and agreed with counsel for the General Counsel to submit Case No. 16-CA-5537 by stipulation of the record in 16-CA-5406 and stipulation of fact and exhibits in 16-CA-5537 to the Administrative Law Judge to be considered together in lieu of a hearing in Case No. 16-CA-5537.

By Order dated June 10, 1974, the Administrative Law Judge granted General Counsel's Motion to Reopen Record and Consolidate Cases. Thereafter, on June 21, 1974, a written stipulation executed by all parties was submitted to the Administrative Law Judge. By Order dated July 1, 1974, the stipulation was approved and, pursuant to its terms providing for the filing of limited briefs, the date for filing of briefs was set for July 15, 1974, pursuant to which a supplemental brief was subsequently submitted by counsel for the Respondent.

Upon the entire record in this consolidated proceeding,[1] and from my observation of the

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1 The General Counsel's motion to correction errors in the transcript, filed after the close of the hearing with notice to all parties, is hereby granted. The transcript is corrected as follows:

Page	Line		Shall read
14	9	"proofs"	"proof"
30	1	"10-day"	"10(b)"
30	16	"right"	"rise"
34	18	"contracted"	"contracting"
37	22	"in"	"of"
38	6	"10-day"	"10(b)"

witnesses, and their demeanor on the witness stand, and upon substantial, reliable evidence "considered along with the consistency and inherent probability of testimony" (*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496), I make the following:

[232]

Findings and Conclusions

I. The Business of the Respondent

A. W. Thompson, Inc., is a Texas corporation maintaining its principal office and place of business in Midland, Texas, and a yard office in Odessa, Texas. The Respondent is engaged in the contract drilling business in various counties in the State of Texas and Lea County, New Mexico, known as the Permian Basin. During the 12 month period immediately preceding the issuance of complaint, the Respondent performed services valued in excess of $50,000 for customers located outside the State of Texas. The parties admit, and I find, that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Page	Line		Shall read
46	25	"of"	"or"
47	14	"sortly"	"shortly"
76	15	"had good"	"had a good"
83	8	"because"	"before"
140	25	"filed because"	"filed *was* because"
141	1	"come forth"	"*to* come forth"
203	18	"more of"	"more *than* of"
206	13	"petitions were"	"petitions *which* were"

II. The Labor Organization Involved

The parties admit, and I find, that Local 826, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts

Background and Issues

On August 2, 1966, pursuant to a Stipulation for Certification Upon Consent Election, an election was held among employees working out of the Respondent's Odessa facility, including employees working on oil drilling rigs in certain West Texas and New Mexico Counties. A majority of the employees having voted for the Union, the Board on August 10, 1966, certified the Union as the collective-bargaining representative. Thereafter, on November 16, 1967, the Union and the Respondent entered into a collective-bargaining agreement, technically referred to as a Working Agreement, said contract terminating on or about August 2, 1968.

Following intervening noncontractual years, the parties on May 29, 1973, executed a Working Agreement covering the same employees. By letter dated October 22, 1973, pursuant to the terms of the contract, the Union advised the Respondent of its desire to open said contract for renegotiations. Subsequently, by letter dated December 3, 1973, Union Business Manager Kenneth Howell requested of Brooks Harman, attorney for the Respondent, dates for the com-

mencement of negotiations to renew the contract, and also requested an updated list of Respondent's employees with addresses.

[233]

On December 20, 1973, Howell again wrote Harman, requesting a contract negotiations meeting with the Respondent at 10 a.m., on December 27, in the latter's office, and also reiterating his earlier request for the employee list. Again, by letter dated December 26, 1973, Howell requested a date for contract negotiations, stressing the fact that the current contract was about to terminate on December 31, 1973. On December 28, 1973, Harman wrote to Howell stating that he had been instructed by the Respondent to inform the Union that the Company in good faith doubted that the Union represented a majority of the Respondent's employees in the bargaining unit, and that the Company declined to negotiate a new or renewal contract. The letter closed by suggesting that if the Union really believed it represented a majority of the Company's employees it should so demonstrate.

On January 1, 1974, by written notice, the Company notified its employees that the Union contract had expired, that the Company had apprised the Union that it no longer recognized it as the exclusive bargaining representative, that it did not believe that the Union represented the majority of the employees, and that, as this was the normal time for consideration for wage increases, it was granting specified hourly wage rate increases to the employees effective with the pay period commencing January 6, 1974. By notice, dated

April 11, 1974, and posted at its 12 rigs, the Respondent without notice to the Union notified its employees of further wage rate increases, effective April 14, 1974. The notice, in setting forth specified hourly rate increases, stated that "It is our understanding that wages paid by our primary competitors are due to be increased in the very near future. Therefore, in order to retain our competitive position in the industry, and to make every reasonable effort we can to keep our qualified and trained personnel and to reduce our turnover, we are increasing wages effective the pay period beginning April 14, 1974, ..."

Simultaneous with this action, the Respondent on April 14, 1974, again without notice to the Union, notified its employees by the distribution of an insurance booklet that their Group Insurance Benefits were being upgraded, increased and extended, retroactively effective as of February 1, 1974.

The above facts, alleged in the complaints as constituting conduct violative of Section 8(a)(1) and (5) of the Act, are uncontroverted. The Respondent, in effect admitting all but the conclusionary "bad faith" allegations of both complaints, raises as an affirmative defense a good faith doubt as to the Union's majority status based upon the following assertions: 1) The Union at no time notified the Company of the appointment of any rig stewards as provided by the Working Agreement; 2) No grievances were ever processed by the Union under the contract's grievance procedure; 3) The bulletin boards at the rigs were never used by the Union for any purposes during the period of the contract, although so provided for by

[234]

the contract; 4) No communication of any kind had been received by the Company from the Union other than the request of October 22, 1973, to renegotiate the contract; 5) The Company, with rigs working over a very wide area of West Texas and New Mexico, had experienced a rapid turnover among its necessary crew complement; 6) The only comments received by the Company from unit employees were unfavorable toward the Union; 7) During the earlier period in which the Union enjoyed a bargaining representative status, it failed to fairly represent the unit employees, thereby causing disaffection of the employees toward the Union. The Respondent justifies its actions concerning both pay raises and the increased insurance benefits on the ground that, for reasons set forth in its affirmative defenses, the Union was no longer the exclusive bargaining representative of the employees, and thus, having withdrawn its recognition of the Union, had no legal obligation to consult with the Union with respect to such economic actions.

Affirmative Defenses

(a) Appointment of stewards

The Respondent, as a first affirmative defense, asserts that "Article IV of the Working Agreement between Respondent and Local 826 provided for rig stewards and that the Union would notify the Company in writing upon the appointment of any steward. The Company has never been notified of the appointment of of any steward and has never heard of any steward being appointed or anyone acting as steward on any rig. The Company operated 11 to 12 rigs during the period of the contract."

The General Counsel admits, and the evidence discloses, that such was the case, that no union stewards were appointed and that the Company was never informed of any appointments. As testified by Frank Thompson, Respondent's president, the Union during contract negotiations had insisted on having stewards represent the Union on the rigs, giving rise to the subject contract provision, and that, pursuant thereto, the Union was supposed to inform the Company of the names of the stewards. This was never done.

(b) No grievances processed

As a second affirmative defense, the Respondent argues that, notwithstanding that Article III of the Working Agreement provides for grievance procedure, no grievances were ever processed with the Respondent by Local 826 or any representative of Local 826.

This fact, also, is unrefuted, the evidence reflecting that, during the contract period, no grievances were filed, and, accordingly, none was processed. It also appears that nothing of any moment occurred giving rise to the use of the grievance machinery, for, as Thompson testified, he could recall nothing happening which would have caused employees to be dissatisfied with their working conditions, that nothing came to his attention concerning problems with employees registering complaints.

[235]

(c) Use of bulletin boards

As a third affirmative defense, the Respondent asserts "The Working Agreement in Article V provid-

ed for the Union's use of bulletin boards in the clothes changing doghouses at each rig. The bulletin boards have never been used by the Union for any purpose during the period of the contract."

The Respondent's evidence in this regard is limited to the testimony of Thompson and his administrative assistant, Theodore Toft, to the effect that, during the contract period, they never saw any union literature posted on the rig bulletin boards, or never heard of any having been posted. Neither, however, could testify that none was posted, and Toft admitted that notices could have been posted of which he had no knowledge. Thompson testified that, during the contract period, he probably visited each rig once, while Toft testified that he probably visited each rig about three times. Union Business Representative Kenneth Howell, on the other hand, testified that notices of union meetings are mailed to employees and that, on occasion, employees posted them on the doghouse bulletin boards, and, on other occasions, employees came by the Union's Odessa office to pick up copies of notices for posting on the bulletin boards.

(d) No union communication

The fourth affirmative defense relied upon by the Respondent states "No communication of any kind has been received by Respondent from the Union except the request to re-negotiate the contract, which request was dated October 22, 1973."

In this regard it is unrefuted, and the evidence indicates, that such was the case, that between the May

29, 1973 execution of the Working Agreement the Union's request of October 22, 1973, to renegotiate that Agreement, there had been no communication by the Union with the Company, and that the only communication thereafter with Thompson, or the Respondent's attorney, were the December follow-up negotiation demands and the request for an updated employee list.

(e) Employee turnover

As a fifth affirmative defense, the Respondent asserts that it had experienced a rather rapid turnover among its necessary crew complement and that Respondent's rigs were working over a very wide area of West Texas and New Mexico. The evidence reveals that during the period between 1966 and the end of 1973, the Respondent's operations had increased from approximately 105 jobs to around 200 jobs. Thompson testified, without refutation, that annually the rate of employee turnover is about 4 to 1, that in calendar year 1973, the Respondent processed 817 W-2 forms, which means that, during the year, over 800 men were employed in the Respondent's 200 jobs.

[236]

(f) Unfavorable employee comments

The Respondent's sixth affirmative defense asserts that the only comments from unit employees coming to management were unfavorable toward the Union. Evidence in support of this assertion is confined to rather vague testimony of Thompson and Toft. When

initially asked for the basis upon which he doubted the Union's majority in the fall of 1973, Thompson, after alluding to employee turnover, was asked if he had finished. His reply was, "Oh, I might think of something else in a few minutes." Whereupon, he testified that "several hands did come in and ask how they could get loose from the Union." Thompson admitted that they did not talk to him, personally, and that he did not know who they are, that that "I could probably get their names." At another point, when asked whether he ever attempted to find out whether any of his employees wanted the Union, Thompson replied that in casual conversations with his employees at different times, "I got the idea that they didn't care about the Union, or didn't know we had it." When later pressed as to whether at any time prior to withdrawing recognition from the Union on December 28, 1973, he had received a report that any particular employee did not want the Union, Thompson admitted that he had not. Thompson testified that he took no measure to determine whether a majority of his employees wanted the Union and did not know as a fact whether such was the case. Toft's testimony was equally vague, in fact he testified that over a period of time, he heard employees question, "When can we get rid of the Union" or "I thought we were rid of the Union." Toft testified that, in "casual conversations once in a while," he advised Thompson of what he heard, but did not recall giving Thompson any names of employees in connection with such union sentiments.

B. Analysis and Conclusions

The General Counsel contends that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing,

since October 22, 1973, to meet and bargain with the Union; by withdrawing recognition from the Union on December 28, 1973; by unilaterally granting employee wage increases on January 6 and April 14, 1974; by refusing to furnish the Union with data relating to names and addresses of employees; and by unilaterally upgrading, increasing and extending insurance benefits on April 14, 1974.

The Respondent, admitting the essential factual allegations of both complaints, defends its action on the assertion that for reasons advanced as affirmative defenses the Union was either unwilling or unable to service its employees, giving rise to its good faith doubt as to the Union's continuing majority status. As a result of its good faith doubt, argues the Respondent, it was entitled to withdraw recognition and, once the contract terminated on December 31, 1973, to grant the wage increases.

[237]

The principles governing an employer's continuing duty to recognize and bargain with a previously certified union are well established[2] and have recently been applied by the Board in a number of decisions, several of which involve oil drilling employers in the Permian Basin.[3] Thus, Board precedent holds that a certified union, upon the expiration of the year follow-

2 *Celanese Corporation of America*, 95 NLRB 664, 671-672; *Terrell Machine Company*, 173 NLRB 1480.

3 *Leatherwood Drilling Company*, 209 NLRB No. 92; *Brahaney Drilling Company*, 209 NLRB No. 93; and *Hondo Drilling Company, N.S.L.*, 213 NLRB No. 32.

ing its certification enjoys a rebuttable presumption that its status as majority representative continues. An employer may lawfully refuse to bargain with the union after the lapse of the certification year if it affirmatively establishes (1) that at the time of the refusal the union no longer commanded a majority, or (2) that the refusal of the employer was predicated upon a reasonable based doubt as to the continuing majority. To establish the former, an employer must have affirmative proof that the majority of employees in the certified unit no longer desired the union to represent them. As to the latter, the employer need establish only that it had a reasonable basis for doubting the union's majority at the time of its refusal to bargain.[4] This, however, must be shown by objective facts and not merely by an assertion thereof or proof of the employer's subjective frame of mind.[5]

In applying the above principles to the case at hand, we need address oursevles only to the second of the two propositions, for there is no proof, nor does the Respondent so assert, that the Union had in fact lost its majority at any time. Accordingly, we must look to the objective facts upon which the Respondent assertedly relied in establishing a reasonable basis for doubting the Union's majority. They are to be found, if in fact they qualify, in the affirmative defenses set forth by the Respondent.

In appraising the affirmative defenses, one must keep in mind that the current Working Agreement

4 *Orion Corporation*, 210 NLRB No. 71; *Automated Business Systems*, 205 NLRB No. 35; *Celanese Corporation of America*, *supra*.

5 *Montgomery Ward & Co., Incorporated*, 210 NLRB No. 120; *Laystrom Manufacturing Co.*, 151 NLRB 1482.

alluded to was executed on May 29, 1973, that it expired on December 31, 1973, and thus, that the contract period involved was some 7 months in duration. Secondly, according to Thompson, a good faith doubt concerning the Union's majority arose right after the May 29 execution of the contract.

[238]

With respect to the failure of the part of the Union to appoint rigs stewards, and thus to notify the Respondent of such appointments, on the one hand, or to process employee grievances with the Respondent, on the other, the Respondent was unable to show that the Union's failure to any way reflected adversely upon its responsibilities as bargaining representative. To the contrary, it appears that, during the entire period, no grievances were filed by employees, and that nothing occurred concerning alleged contract violations or employee discontentment with working conditions which would warrant the filing of grievances. Such conditions obviate the necessity of appointing rigs stewards, and thus the failure to notify the Respondent "upon the appointment of any steward," or to process grievances which were never filed, hardly constitutes a reasonable basis for doubting the Union's majority.

Concerning the Respondent's assertion that the bulletin boards at the rigs were not used by the Union during this period, it appears, first, that the provision of the Working Agreement alluded to by the Respondent in no way requires the Union to use the bulletin boards, but merely grants it the privilege of doing so,

and, secondly, that, in fact, the Union did, at least on occasion, post its meeting notices on these boards. The fact that notices were often torn down raises a question as to the value of the bulletin boards as a means of communicating with employees. In any event, I find this argument without merit.

The Respondent's fourth affirmative defense, its assertion that no union communication of any kind, other than the October 22, negotiation request, was received by the Respondent, must fall on the admitted evidence herein. In addition, to the initial negotiation request of October 22, the Union's letters of December 3 and December 20, reiterating its request for bargaining negotiations as well as for an updated list of employees and addresses, went unanswered. It was not until December 28, after one more union communique had been received and 2 days before the expiration of the Working Agreement, that the Respondent replied, and then only to apprise the Union for the first time that it doubted its majority status and was declining to negotiate, in effect withdrawing recognition of the Union. This defense must fall for obvious reasons.

Turning to the Respondent's fifth affirmative defense, the unrefuted evidence supports the Respondent's assertion that it had experienced a rapid turnover among its employee complement. While the processing in excess of 800 W-2 forms in 1 year for a 200-job operation might well create in one's mind a question as to whether a union had retained its majority, the Board has specifically ruled that employee turnover alone is insufficient legal ground upon

which to base a good faith doubt of union majority.[6] The fact that the Board within the past few

[239]

months reiterated this holding, and did so in three decisions involving operations in the Permian Basin identical to that of the Respondent, renders the Respondent's argument in this regard without merit.

As in the case of the foregoing defenses, I find that the Respondent failed to carry its burden of proving its sixth affirmative defense, that which asserts that the only comments coming from unit employees were unfavorable toward the Union. Apart from the fact that neither Thompson nor Toft was convincing in testifying as to this matter, neither was able to provide names or details concerning alleged employee expressions of dissatisfaction with the Union. The fact that "several" employees out of a unit of up to 200 employees may have casually expressed at one time or another dissatisfaction with, or indifference to, the Union, such does not constitute a reasonable basis upon which to assert a good faith doubt of majority. In this regard, the Board has held that evidence of dissatisfaction with the Union, to be of any significance, must come from the employees themselves, not from the employer on their behalf.[7]

In finding, as I do, that the Respondent has failed in its burden of proof as to its affirmative defenses, I

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6 *Laystrom Manufacturing Co., supra.*

7 *Terrell Machine Company, supra; Montgomery Ward & Co., Incorporated, supra.*

further find that the evidence does not support the Respondent's assertion that the Union was either unwilling or unable to service its employees and that such, independently, supports an asserted good faith doubt.

Apart from its failure to meet the requirements for establishing a reasonable basis for a good faith doubt of the Union's continuing majority, the fact that the Respondent, although asserting a good faith doubt throughout the entire fall of 1973, failed to apprise the Union of its position in this regard until December 28, 1973, just 2 days before the Working Agreement expired, coupled with its earlier refusal to meet, to supply the Union with requested employee data, or to in any way justify its having ignored such requests, in itself casts a cloud on the sincerity with which the Respondent advances its good faith argument. I find, in refusing since October 22, 1973 to meet and to negotiate in good faith with the Union, and in withdrawing recognition from the Union on December 28, 1973, the Respondent unlawfully refused to bargain in violation of Section 8(a) (5) and (1) of the Act.

I further find, under the conditions prevailing in the Permian Basin, including the employee turnover, the wide area covered by the Respondent's operations, and the inadequacy of alternative means of communicating with unit employees, the employee data requested of the

[240]

Respondent by the Union on December 3, 1973, was relevant and necessary to the Union in order that it

might properly fulfill its functions as bargaining representative of Respondent's employees. Accordingly, the Respondent's refusal to furnish the Union with an updated list of the names and addresses of its employees constitutes an independent violation of Section 8(a)(5) of the Act.[8]

Having found that the Respondent unlawfully withdrew recognition from the Union on December 28, 1973, it follows, without the need for elaboration, that the Respondent's unilateral employee wage increase of January 6, 1974, announced to its employees contemporaneously with the announcement of its withdrawal of recognition, and its follow-up unilateral employee wage increase of April 14, 1974, constitute separate violations of Section 8(a)(5) and (1) of the Act.[9]

Remaining for resolution is the Section 8(a)(5) complaint allegation that the Respondent, on or about April 14, 1974, without prior notification to, or consultation with, the Union, distributed to its employees a booklet notifying them that their group insurance plan had been upgraded and that their benefits thereunder had been increased and extended effective February 1, 1974. The stipulated facts relating to this issue reveal that the Respondent had a Group Insurance Plan in existence covering unit and nonunit employees, and that the Working Agreement in effect between May 29, 1973 and December 31, 1973, contains the following relevant provisions:

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8 The fact that the Respondent subsequently complied with this request pursuant to a subpoena issued by the General Counsel of the Board in no way alters this finding.

9 *Brahaney Drilling Company, supra.*

10.1 The Company has a group insurance program for employees of the Company who qualify. The Company presently pays all premiums on such insurance.

10.2 The program consists of $5,000, double-indemnity, life insurance, hospitalization and medical major insurance. The hospitalization and major medical covers both the employee and dependents. All the insurance is subject to the employee qualifying and subject to the conditions set forth in the group policy.

10.3 The above-mentioned insurance is automatic to those employees who have completed one (1) year's continuous service as that term is defined under the Article "Vacation and Holiday".

[241]

10.4 The Company agrees to continue the present insurance program in effect at its present premium costs but reserves the right to unilaterally determine if it will increase its costs if the premiums increase.

10.5 Since the policy is one which covers employees other than bargaining unit employees, as well as bargaining unit employees, the Company shall have the right to negotiate with the insurance company or a different insurance company as to costs and benefits, as well as for comparable or in-

creased benefits; and may institute such new policy upon authorization of participation of the necessary number of employees required by the insurance company.

Pursuant to the provision of the Working Agreement, an increase of group benefits was negotiated by the Respondent with the Hartford Life and Accident Insurance Company, said negotiations having commenced on September 7, 1973, and concluded on December 18, 1973, prior to the expiration of the Working Agreement. Thereafter, in March 1974, such increased and upgraded benefits were published and printed in booklet form by the Hartford Life and Accident Insurance Company, and subsequently transmitted to the Respondent for distribution to its employees. The booklet noted that the upgraded plan, with its increased and extension of benefits, was effective February 1, 1974. The Respondent, in turn, made such distribution to its employees, unit and nonunit employees alike, on April 14, 1974.

I find, as argued by the Respondent, that the provisions of the Working Agreement clearly gave the Company the unilateral authority to negotiate with the insurance company or a different insurance company as to costs and benefits, and that the Respondent was authorized to put into effect such new policy upon authorization of participation of the necessary number of employees required by the insurance company. The Working Agreement contained no provision requiring union negotiation, consultation, or even notification, as a requisite to such action by the

Respondent. The Respondent's negotiation of increased benefits with the Hartford Life and Accident Insurance Company was carried on and concluded during the life of the Working Agreement, was well within the unilateral authority of the Respondent under the Working Agreement to do so, and the fact that the booklet containing the increased benefits was not published by the insurance company and, thus, not distributed by the Respondent, until the following March and April, does not render the action unlawful. Accordingly, I find under these circumstances that the Respondent's conduct in this regard was not an unfair labor practice and that, in this particular, Respondent did not violate Section 8(a)(5) of the Act.

[242]

Upon the basis of the above findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. A. W. Thompson, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 826, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All the employees of the Respondent working out of the Respondent's Odessa, Texas, facility, including employees working on rigs in the following Counties: Yoakum, Terry, Gaines, Dawson, Andrews, Loving, Winkler, Ector, Midland, Glasscock, Reeves, Ward, Crane, Upton, Reagon, Pecos, Crockett, Terrell and Martin (all in Texas) and Lea County, New Mexico, and including truck drivers and maintenance employees working at the Respondent's Odessa, Texas, facility but excluding office clerical employees, drillers, shop foremen, truck foremen, guards and supervisors as defined in the Act, as amended.

4. At all times since August 2, 1966, the Union has been and is now the exclusive bargaining representative of the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing since October 22, 1973, to meet with the Union and to confer in good faith with respect to wages, hours, and other terms and conditions of employment, and thereafter, on December 28, 1973, withdrawing recognition from the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By refusing in December 1973, to furnish the Union with data relating to the names and addresses of its employees, and by unilaterally granting on January 6, 1974, and again on April 14, 1974, without notification

to or consultation with the Union, wage increases to its employees, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By the foregoing conduct, the Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[243]

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Other than as above found, the Respondent has not violated the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and that it take certain affirmative action which is necessary to effectuate the policies of the Act.

Although it has been found that the Respondent unlawfully granted its employees wage increases on January 6, 1974, and again April 14, 1974, it is not recommended that the Respondent be ordered to rescind its actions in this regard or to retract the wage increases.

Upon the foregoing findings of fact, conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

The Respondent, A. W. Thompson, Inc., and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive collective-bargaining

10 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

representative of the employees in the following appropriate unit:

[244]

All the employees of the Respondent working out of the Respondent's Odessa, Texas, facility, including employees working in rigs in the following Counties: Yoakum, Terry, Gaines, Dawson, Andrews, Loving, Winkler, Ector, Midland, Glasscock, Reeves, Ward, Crane, Upton, Reagan, Pecos, Crockett, Terrell and Martin (all in Texas) and Lea County, New Mexico, and including truck drivers and maintenance employees working at the Respondent's Odessa, Texas, facility, but excluding office clerical employees, drillers, shop foremen, truck foremen, guards and supervisors as defined in the Act, as amended.

(b) Withdrawing recognition from and refusing to meet with the Union as the exclusive bargaining representative of employees in the appropriate unit.

(c) Refusing to furnish the Union data relating to the names and addresses of its employees, unilaterally granting wage increases to its employees or otherwise changing wages, hours, or other terms and conditions of employment, without notification to, or consultation with, the Union.

(d) In any like or related manner interfering, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post in conspicuous places at its Odessa, Texas facility, and at all bulletin boards located at the "doghouses" at each rig operated by the Respondent in the geographical area covered by the above appropriate unit, copies of the notice attached hereto marked "Appendix."[11]

Copies of

[245]

the notice on forms provided by the Regional Director for Region 16, shall, after being duly signed by an authorized representative of the Respondent, be

11 In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

posted by it, as aforesaid, immediately upon receipt thereof and maintained for at least 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D.C., November 7, 1974.

/s/ Wellington A. Gillis
Wellington A. Gillis
Administrative Law Judge